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No. 07-147

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IN THE

Supreme Court of the United States

EDGE PETROLEUM OPERATING COMPANY, INC.,
Petitioner,

v.

DUKE ENERGY TRADING AND MARKETING, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied to the particular facts of this case the well-established standards for determining when a state court lawsuit is sufficiently "related to" a bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b) to allow for removal to federal court.

2. Whether the court of appeals correctly applied well-established standards in holding that the lower courts were not required to abstain pursuant to the mandatory abstention provision in 28 U.S.C. § 1334(c)(2).

3. Whether the court of appeals correctly concluded that it was barred by the express terms of 28 U.S.C. § 1334(d) from reviewing the lower courts' discretionary decisions not to abstain in this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Duke Energy Trading and Marketing, L.L.C. is a joint venture owned by Duke Energy Corporation and ExxonMobil Corporation, and Duke Capital L.L.C. Duke Capital L.L.C. is a wholly owned subsidiary of Duke Energy Corporation. There is no publicly held company that owns 10% or more of Duke Energy Trading and Marketing, L.L.C.

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RULE

Sup. Ct. R. 10 1

Petitioner Edge Petroleum Operating Company, Inc. requests nothing more than classic error correction in its Petition. No issue that it presents remotely meets the criteria for obtaining review by this Court. It alleges no conflict among the lower courts on the questions presented, Sup. Ct. R. 10(a), nor does it present an "important question of federal law," *id.* 10(c). Rather, petitioner's challenges merely involve application of well-settled legal standards to the particular facts of this case. Respondent Duke Energy Trading and Marketing, L.L.C. ("Duke") regrets the need for even a somewhat lengthy opposition in such a case. However, the Petition is so confusing that Duke believes an accurate statement of the facts and issues would benefit this Court.

STATEMENT OF THE CASE

1. The underlying lawsuit here is a state court conversion action. Petitioner, a natural gas producer, sold gas through its agent to GPR Holdings, L.L.C. ("GPR"), Aurora Natural Gas, L.L.C. ("Aurora"), and Golden Prairie Supply Services, L.L.C. ("GPSS") (collectively "Debtors") for delivery in May and June 2001. Pet. App. at 2a, 29a. Debtors have never paid petitioner for the gas. *Id.* at 2a, 30a. They did, however, sell the gas to Duke, which immediately resold it to third parties. *Id.* at 2a. Duke took the gas from Debtors as a means to offset in part its overpayment to them for other gas shipments in previous months. *Id.* at 2a-3a, 36a.

In August 2001, each of the Debtors filed bankruptcy petitions. Pet. App. at 30a; *id.* at 2a. Rather than sue these companies for non-payment, petitioner sued Duke in Texas state court in September 2001. *Id.* at 2a; Court of Appeals Record Excerpts ("RE") at 262. Through its complaint, petitioner sought to establish its "'security interest and statutory lien in the Gas or proceeds.'" RE at 333. Petitioner alleged that under section 9.343 of the Texas Business and Commercial Code it had an automatically perfected security

interest in the gas sold to Debtors and in the proceeds from the gas' sale; that Duke did not pay for the gas, but accepted the gas as settlement of a debt; that accordingly Duke cannot be a holder in due course, which would extinguish its liability; and that, therefore, Duke is liable to petitioner for conversion of the gas, for which petitioner can recover the price of the gas or the proceeds Duke made from its sale. Pet. App. at 3a, 18a.

Critically, Debtors also sued Duke for having taken the gas to offset prior overpayments. Pet. App. at 3a & n.9, 36a. Aurora's bankruptcy trustee, GPR, and GPSS commenced an adversary bankruptcy proceeding against Duke "to collect the receivable from Duke or to avoid the offset transfers." *Id.* at 36a (citing *GPR Holdings, LLC* v. *Duke Energy Trading & Mktg., LLC*, No. 03-3430 (Bankr. N.D. Tex.)). Duke raised as a defense in this adversary proceeding the right to credit any recovery allowed against it in any other suit concerning this issue, thus making any recovery by petitioner a defense to the adversary proceeding.

In March 2002, Aurion Technologies, L.L.C. ("Aurion") filed a petition for bankruptcy. RE at 262, 329. Aurion was the majority shareholder of Aurora and the assignee of some of Aurora's contract rights arising from the sale of gas to Duke. Pet. App. at 3a, 7a-8a; RE at 334.

2. In May 2002, Duke removed petitioner's state court suit to the United States District Court for the Southern District of Texas, and, shortly thereafter, petitioner moved to remand to state court. Pet. App. at 3a; RE at 259. Petitioner argued that there was no federal court jurisdiction because removal was untimely as to all bankruptcy proceedings except Aurion's, but that the suit was not "related to" Aurion's bankruptcy proceeding under 28 U.S.C. § 1334(b). Pet. App. at 3a-4a; RE at 259-60, 262-63. Petitioner also argued that abstention was mandatory under 28 U.S.C. § 1334(c)(2) or warranted in the court's discretion under 28 U.S.C. § 1334(c)(1). RE at 263.

The District Court denied petitioner's remand motion, ruling that removal was timely with respect to the Aurion bankruptcy proceeding, that petitioner's suit "related to" the bankruptcy proceedings, and that abstention was neither mandatory nor appropriate. Pet. App. at 4a; RE at 259-66. The court then denied petitioner's motion for reconsideration and granted Duke's request to transfer the case to the United States District Court for the Northern District of Texas, where Aurion's and the Debtors' bankruptcy petitions were pending. Pet. App. at 4a. The bankruptcy court in the Northern District denied petitioner's motion requesting that the court abstain, RE at 439; petitioner consented to jurisdiction; Debtors intervened as defendants; and petitioner, Duke, and Debtors all cross-moved for summary judgment. Pet. App. at 4a, 28a.

On the merits, the bankruptcy court held that petitioner could not enforce the security interest created by section 9.343 of the Texas Business and Commercial Code against Duke in a conversion action under Texas law and granted Duke's and Debtors' summary judgment motions. Pet. App. at 4a, 25a, 51a-52a. The District Court affirmed without opinion, *id.* at 26a, and petitioner appealed to the Fifth Circuit, challenging the federal courts' jurisdiction and grant of summary judgment in favor of Duke and Debtors.

3. The Fifth Circuit rejected petitioner's jurisdictional challenges and affirmed the grant of summary judgment. It first held that federal subject matter jurisdiction existed because petitioner's state court suit "related to" Debtors' and Aurion's bankruptcy proceedings, making Duke's removal timely and proper.

Relying on long-standing Fifth Circuit precedent, the court of appeals concluded that petitioner's suit "related to" the bankruptcy proceedings because its outcome "could conceivably affect the estate being administered" by potentially "alter[ing], positively or negatively, the debtor's rights, liabilities, options, or freedom of action or ... influence[ing] the administration of the bankrupt[cy] estate."

Pet. App. at 5a-6a (citing *Arnold* v. *Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir. 2001), and *Feld* v. *Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir. 1995)). Applying this well-established standard to the facts before it, the Fifth Circuit explained that the estate could be affected because either Duke or Debtors owed petitioner for the gas, and if the outcome of petitioner's suit was that it is Duke, then Duke would have "discharged a liability of the debtors" and would likely seek reimbursement from Debtors' estates. *Id.* at 6a. Also, the court of appeals concluded that a determination as to who Debtors owe for the gas would "likely affect the administration of the debtors' estates and may alter the debtors' rights and liabilities." *Id.* at 7a.

The court of appeals also rejected petitioner's challenge to Duke's removal as untimely. It explained that Duke removed the suit within the ninety-day period after an order for relief in Aurion's bankruptcy proceeding and the removal was therefore timely pursuant to Federal Rule of Bankruptcy Procedure 9027(a)(2)(A). Pet. App. at 7a-8a. The court of appeals dismissed petitioner's argument that its state court suit was not "related to" the Aurion proceeding, even if "Aurion bore an attenuated relationship to the parties." *Id.* at 7a. It held that the lower court had not clearly erred in finding that "Aurion was the assignee of certain of Aurora's contractual rights arising from its sale of gas to Duke." *Id.* at 7a-8a. Thus, the lower court properly concluded that the suit could "conceivably affect" the Aurion estate because "the outcome of this case could affect Aurion's recovery from Duke in the separate litigation involving Duke and the debtors." *Id.* at 8a.

The Fifth Circuit next held that abstention was not mandatory under 28 U.S.C. § 1334(c)(2), which requires a bankruptcy court to abstain, in certain circumstances, from adjudicating non-core state law causes of action that are brought within a bankruptcy proceeding. The court of appeals applied the well-established standard that abstention

is only mandatory if there is, among other things, "'no independent basis for federal jurisdiction, other than § 1334(b).'" Pet. App. at 9a (quoting *Schuster* v. *Mims (In re Rupp & Bowman)*, 109 F.3d 237, 239 (5th Cir. 1997)).

The court of appeals then reasoned that petitioner's complaint raised two possible claims that had an "independent basis for federal jurisdiction." Pet. App. at 9a-11a. First, the court of appeals agreed with the lower courts that "the complaint was drafted broadly enough to provide the right to pursue a claim against the proceeds of the sale from the debtors to Duke as well as the proceeds from the sale from Duke to third parties." *Id.* at 10a. Petitioner's potential claim "against the proceeds of the sale from debtors to Duke" sought property within the bankruptcy estates and was, therefore, a core proceeding that gave rise to federal question jurisdiction. *Id.*

Second, the court of appeals explained that the claim against Duke for the proceeds from Duke's sale of gas to third parties arose from the same "'common nucleus of operative fact'" as the core claim, giving the federal court supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Pet. App. at 11a. That petitioner did not pursue the core claim and "pressed only its supplemental claim did not affect the propriety of abstention *vel non*." *Id.* at 11a & n.22 (citing 28 U.S.C. § 1367 and noting that federal courts may retain supplemental jurisdiction when federal claims are dismissed).

As to permissive abstention, the court of appeals merely noted and agreed with petitioner's concession that "the district court's refusal to abstain as a matter of discretion pursuant to § 1334(c)(1) is unreviewable on appeal." Pet. App. at 11a n.20 (citing 28 U.S.C. § 1334(d)). Finally, the Fifth Circuit affirmed the lower courts' ruling on the merits that petitioner "cannot recover its alleged security interest through an action for conversion against Duke." *Id.* at 21a.

REASONS FOR DENYING THE PETITION

Petitioner makes no effort to allege any conflict in authority among the lower courts on the questions presented. It thus presents no disagreement or lack of uniformity that warrants this Court's attention. On that basis alone, the Court should deny the Petition. Nor is there any merit to petitioner's claims that the Fifth Circuit created a new standard for determining when a state court suit is "related to" a bankruptcy proceeding and erred in refusing to abstain either as a mandatory or discretionary matter. None of these claims presents an issue that merits this Court's review. In any event, petitioner is mistaken on all fronts.

I. PETITIONER'S CLAIM THAT THE FIFTH CIRCUIT CREATED A NEW "RELATED TO" STANDARD DOES NOT PRESENT A BASIS FOR REVIEW BY THIS COURT AND, IN ANY EVENT, IS BASELESS.

1. Petitioner contends that the Fifth Circuit has expanded, through a series of cases, the "related to" test, culminating in a new "'attenuated'" standard in this case. Pet. at 8, 11-13. Even if this were true, it would at most provide a possible basis for en banc review by the Fifth Circuit, not review by this Court, because petitioner identifies no split among the lower courts on this issue. In all events, petitioner is wrong.

The Fifth Circuit stated that the governing standard for determining when a state law suit is "related to" a bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b) is that the "proceeding could conceivably affect the estate being administered in bankruptcy," meaning that "the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankruptcy estate." Pet. App. at 5a-6a. This is the same standard that the Fifth Circuit adopted from the Third Circuit two decades ago. See *Wood* v. *Wood* (*In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) (quoting *Pacor, Inc* v.

Higgins, 743 F.2d 984, 994 (3d Cir. 1984)). Indeed, over a decade ago, this Court recognized that the Fifth Circuit along with many other courts had adopted this very test. See *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 n.6 (1995) (favorably quoting the *Pacor* test and recognizing that the Fifth Circuit had adopted it in *In re Wood*).

The decisions petitioner cites did not "expand" the standard for determining whether suits are "related to" bankruptcy proceedings. Pet. at 12-13. In each decision, the Fifth Circuit merely applied the same "conceivably affect" standard it adopted two decades ago to the particular facts of the case. See *Arnold* v. *Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir. 2001) ("[T]he test for whether a proceeding properly invokes federal bankruptcy jurisdiction is the same as the Third Circuit's *Pacor* test, namely, whether 'the outcome of that proceeding could conceivably have an effect on the estate being administered in bankruptcy.'"); *Randall & Blake, Inc.* v. *Evans (In re Canion)*, 196 F.3d 579, 585 (5th Cir. 1999)[1] (same; relying on, *inter alia*, *Pacor* and *In re Wood*); *Bass* v. *Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999)[2] (same; relying on, *inter alia*, *Celotex* and *Pacor*); *Walker* v. *Cadle Co. (In re Walker)*, 51 F.3d 562, 569 (5th Cir. 1995) (finding no "'conceivable effect'"). Rather than illustrate an evolving standard, petitioner's argument and citations instead

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[1] Petitioner asserts incorrectly that *In re Canion* "further expanded" the applicable standard by not requiring "an expectation of success." Pet. at 12-13. But the court of appeals was just following its own prior statement from *In re Wood* that any effect need only be "*conceivable*." 825 F.2d at 94 ("Although we acknowledge the possibility that this suit may ultimately have no effect on the bankruptcy, we cannot conclude . . . that it will have no *conceivable* effect.").

[2] Petitioner also errs in contending that *In re Bass* "expand[ed]" the test to include "matters where state courts are concerned." Pet. at 12. The federal statutes themselves have long provided for removal of state court cases when they are "related to" bankruptcy proceedings within the meaning of § 1334(b). *See* 28 U.S.C. § 1452 (providing for removal of a civil action if a district court has jurisdiction pursuant to § 1334).

demonstrate the Fifth Circuit's consistent use of the same long-standing test.

In claiming otherwise, petitioner completely mischaracterizes the court of appeals' decision. The court did not make "'attenuated'" the "pivotal jurisdictional connection," Pet. at 8; it merely used that term to characterize the relationship between the various debtors, but plainly applied the same legal standard it has employed for over two decades. See Pet. App. at 7a ("Although . . . Aurion bore an attenuated relationship to the parties, *the test for 'related to' bankruptcy jurisdiction is sufficiently broad to provide federal jurisdiction in this case* . . . ." (emphasis added)).

2. Ultimately, petitioner is simply asking this Court to correct alleged errors in the Fifth Circuit's application of its long-standing test to the particular facts of this case. See Pet. at 15 ("Aurion Technologies' relationship to the parties is too remote to satisfy the *existing* 'related to' standard in the Fifth Circuit of whether 'the outcome of the proceeding could conceivably have an effect on the estate being administered.'" (emphasis added)); *id.* at 14 ("An action is related to a bankruptcy case . . . 'if the outcome could conceivably have an effect on the bankruptcy estate.'"). Petitioner's unhappiness with the Fifth Circuit's conclusions and its desire to have perceived errors corrected in this single case simply do not warrant this Court's attention.

Nor is there any error to correct. As the Fifth Circuit straightforwardly reasoned, petitioner's suit could "conceivably affect" Aurion's bankruptcy proceeding. Aurion is the assignee of some of Aurora's contracts with Duke – a fact petitioner cannot challenge, see, *e.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (noting that the Supreme Court typically "cannot undertake to review concurrent findings of fact by two courts below"), *aff'd on reh'g on other grounds*, 339 U.S. 605 (1950) – meaning that Aurion's estate could benefit from Aurora's trustee's suit against Duke for having taken the gas to offset previous

overpayments. And as the Fifth Circuit recognized, if Duke were liable to petitioner, that "outcome . . . could affect Aurion's recovery from Duke in [that] separate litigation involving Duke and the debtors." Pet. App. at 8a.

Petitioner nonetheless contends that "related to" jurisdiction should be available only if petitioner sought payment from Aurion or the other Debtors. Pet. at 13-16. This Court, however, has already rejected such a position in recognizing that "[p]roceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp.*, 514 U.S. at 307 n.5 (citing 1 *Collier on Bankruptcy* ¶ 3.01[1] [c] [iv], at 3-28 (15th ed. 1994)). This Court's statement in *Celotex* fully supports the Fifth Circuit's conclusion that the suit between petitioner and Duke might affect Aurion's estate.

Finally, petitioner's reliance on this Court's interpretation of the federal officer removal statute in *Watson* v. *Philip Morris Cos.*, 127 S. Ct. 2301 (2007), is inapposite. Petitioner claims that this Court should adopt the reasoning in *Watson* in establishing limits on federal courts' "related to" jurisdiction. Pet. at 8-9. But this Court already examined § 1334(b)'s history, purpose, and language, determined that "'related to' jurisdiction cannot be limitless," and nonetheless approvingly cited the same test that the Fifth Circuit employed below. *Celotex Corp.*, 514 U.S. at 308 & n.6.

II. PETITIONER'S REQUEST FOR ERROR CORRECTION OF THE COURT OF APPEALS' MANDATORY ABSTENTION RULING DOES NOT MERIT REVIEW.

Petitioner likewise fails to demonstrate that the lower courts' determination that abstention is not mandatory merits this Court's attention. Pet. at 16-17. Petitioner does not allege any conflict among the lower courts on the applicable legal standard. Nor does it claim that the court of appeals used an incorrect legal standard. It merely claims that "the

appellate court was wrong in finding an independent basis for federal jurisdiction." *Id.* at 17. This contention provides no occasion for this Court's review.

Once again, moreover, there is no error for this Court to correct. The court of appeals explained that petitioner's broadly written complaint gave rise to two claims and that both had an independent basis for federal court jurisdiction aside from § 1334(b). Pet. App. at 9a-10a. Specifically, the court of appeals correctly agreed with the lower courts that petitioner's complaint would allow it to seek the proceeds of Debtors' sale of gas to Duke, which would be a core proceeding because petitioner could seek to have "'property of the estate,'" in the form of accounts receivable, turned over to it. *Id.* at 10a & n.20 (quoting 28 U.S.C. § 157(b)(E) (defining one of many core proceedings)). The court of appeals also correctly concluded that because petitioner's claim against Duke arose from a "'common nucleus of operative fact'" with the first claim, the district court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367, and therefore an independent basis for jurisdiction. *Id.* at 11a.

Petitioner nonetheless contends that the "Fifth Circuit erred" in construing its complaint. Pet. 16. Plainly, the court of appeals' construction of its complaint does not warrant this Court's review. In any event, the lower courts were well within their authority to look to the face of petitioner's complaint. Pet. App. at 10a (relying on *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908)). Indeed, as the Fifth Circuit noted, petitioner "should have sought leave to amend its complaint rather than confuse the lower courts into addressing both theories." *Id.* at 10a.

III. THE COURT OF APPEALS' DETERMINATION THAT THE LOWER COURTS' VOLUNTARY ABSTENTION RULINGS ARE UNREVIEWABLE IS CORRECT AND DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioner's challenge to the lower courts' discretionary refusal to abstain likewise raises no issue worthy of review. Pet. at 17-20. Again, petitioner does not assert any conflict among the lower courts and requests mere error correction. See, *e.g.*, *id.* at 17 ("The Lower Courts Erred in not Remanding"). And on that point, its argument is frivolous. As the Fifth Circuit – and apparently petitioner – recognized, Congress expressly provided that lower courts' decisions not to abstain as a discretionary matter in this context are unreviewable by the courts of appeals and this Court. See 28 U.S.C. § 1334(d) ("Any decision to abstain or not to abstain made under subsection (c) . . . is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court of the United States . . . ."); Pet. App. at 11a n.20 ("As [petitioner] acknowledges, the district court's refusal to abstain as a matter of discretion pursuant to § 1334(c)(1) is unreviewable on appeal.").

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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